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CRL A No.535 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.10.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal No.535 of 2021

and

CrI.M.P.no.11548 of 2021

Mani @ Manikandan

... Appellant

Vs.

The State rep. by its
The Inspector of Police
Salem Town, All Women Police Station
Salem
Crime No.18 of 2015

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to set aside the conviction and sentence passed in New Spl.S.C.No.20 of 2019 by the learned Sessions Judge, POCSO Cases, Special Court, Salem dated 14.09.2021.

For Appellant : M/s.S.Sridevi
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed in New Spl.S.C.No.20 of 2019 dated 14.09.2021 by the learned Sessions Judge, POCSO Cases, Special Court, Salem.

2.The respondent police registered the case in Crime No.18 of 2015 against the appellant initially for the offence under Section 506(ii) IPC and Section 3 punishable under Section 4 of POCSO Act, 2012 and after completing the investigation, laid charge sheet for the offence under Section 506(ii) IPC and Section 3 punishable under Section 4 of POCSO Act, 2012 before Sessions Judge, Mahila Court, Salem and the same was taken on file in Spl.S.C.No.32 of 2016. The learned Sessions Judge, after completing the formalities framed charges against the appellant for the offence under Section 506(2) IPC and Section 5(1) of POCSO Act 2012 punishable under Section 6 of POCSO Act and subsequently, the case was transferred to the Special Court for POCSO Cases, Salem, and assigned new number Spl.S.C.No.20 of 2019.



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3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 11 witnesses were examined as P.W.1 to P.W.11 and 19 documents were marked as Exs.P.1 to P.19 and one material object was exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, the accused denied the same as false and pleaded not guilty. On the side of the defence, two witnesses were examined as D.W.1 and D.W.2 no documentary evidence was produced.

5. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, found the appellant guilty for the offence under Section 5(1) of POCSO Act 2012 punishable under Section 6 of POCSO Act and Section 506(1) of IPC and convicted and sentenced to undergo Ten years Rigorous Imprisonment and to pay fine of Rs.20,000/- in default to undergo simple



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imprisonment for a further period of six months for the offence under Section 5(1) of POCSO Act 2012 punishable under Section 6 of POCSO Act; to undergo two years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of three months for the offence under Section 506(1) IPC. Challenging the said Judgment of conviction and sentence, the accused has filed the present appeal before this Court.

6. The case of the prosecution is that the appellant the neighbour of the victim girl and he is survived by his wife and child. The wife of the appellant is a handicapped in leg. Hence, the neighbour women used to help her in doing household work and to take care of her child. Further, whenever the wife of the appellant used to sit in the neighbour's house, she would ask the victim girl to fetch milk for the child from her house and the victim would go to the house of the appellant and fetch milk. While so, in the year of 2015, one week before Diwali Festival, the wife of the appellant had asked the victim girl to fetch milk in a bottle from her house. Hence, the victim girl went to the house of the appellant. At



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that time, the appellant bolted the door from inside, closed the mouth of the victim with cloth and made her to lie on the cot by tying her hands and forcible had penetrative sexual intercourse with her. Further the appellant had threatened the victim not to disclose the same to anyone. In continuation of the same, on 21.12.2015 at about 6.00 p.m., when the victim had gone to the house of the appellant, again the appellant had forcible penetrative sexual intercourse with her. Thereafter, the victim informed the same to her mother. Subsequently, the mother of the victim lodged the complaint on 26.12.2015.

7. The Learned counsel for the appellant submitted that the appellant has not committed any offence as projected by the prosecution. The appellant is the neighbor of the victim and the wife of the appellant is a handicapped. The mother of the victim had borrowed loan from the wife of the appellant and since she had not repaid the amount, the wife of the appellant had insisted the mother of the victim to repay the loan amount and therefore, there was a quarrel between the wife of the appellant and the mother of the victim girl during which, the wife of the



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appellant was beaten by the mother of the victim and her associates.

When the same was questioned by the appellant, the mother and father of the victim along with the brother of the mother of the victim attacked the appellant due to which, the appellant sustained injuries. Hence, the one Dinesh lodged a complaint before the Annathanapatti Police and the police had informed that they would enquire about the same on the next day. In the meanwhile, in order to escape from the clutches of law and also to swallow the borrowed money, they have foisted the false case against the appellant. Even P.W.1/mother of the victim admitted that her brother also attacked the appellant and threw stone on the appellant and fortunately, he was pulled aside by the people who had gathered there otherwise, the appellant would have died. Further there are material contradictions even between the evidence of the victim made before the Court while examining as P.W.2 and before the Magistrate while giving statement under Section 164 Cr.P.C. Though the doctor has stated that the victim was subjected to penetrative sexual assault, the victim did not mention the name as to who subjected her to penetrative sexual assault before the doctor. Further, there is a delay in lodging the complaint which



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itself creates doubt and the same would vitiate the case of the prosecution. He would further submit that the victim has not specifically stated the dates on which date, the appellant had misbehaved with her and had sexual intercourse with her. Further the brother of the mother of the victim who attacked the appellant was not examined. The victim in her previous statement has stated that on 21.12.2015 the wife of the appellant had told one Revathy to inform the victim to bring milk from her house and the said Revathy who is alleged to have seen the girl before the second incident was also not examined on the side of the prosecution. The non examination of the vital witnesses is fatal to the case of the prosecution. The wife of the appellant was examined as D.W.1 and she has clearly stated due to previous motive regarding non payment of the borrowed money, the false complaint was lodged by the mother of the victim/P.W.1 against the appellant. Though the victim/P.W.2 in her cross examination stated that she did not know whether her mother had borrowed money from the wife of the appellant, she has admitted that one day there was a quarrel between her mother and the wife of the appellant. Further, D.W.1/wife of the appellant clearly



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stated that her husband is so affectionate with her and he is even having her photo in his cell phone. The appellant is an auto driver and he used to leave home early in the morning and come home only in the afternoon for lunch and after having lunch, will leave home and would come back only in the night and therefore, there is no possibility for committing such an offence. The doctor who examined the victim has given opinion that symptoms appears to have had sexual intercourse which would show that the character of the victim is not good. The victim had affair with some other person and in order to hide the same, she has falsely named the appellant. Since already there was a previous motive between the parents of the victim with the family of the appellant, they have made use of the victim and foisted the false case against the appellant. However, there is no materials to support the case of the prosecution. Eventhough, the appellant is alleged to have given confession, the alleged confession is not admissible in evidence and the trial Court has erroneously convicted the appellant which warrants interference.



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8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the appellant is the neighbour of the victim. The wife of the appellant is handicapped and they have got a male baby. The wife of the appellant used to sit in the neighbour's house and ask the victim to bring milk from her house and the victim used to bring milk from the house of the appellant. One such occasion, when the victim went inside the house of the appellant to fetch milk, the appellant closed the door and covered the mouth of the victim with cloth and made the victim to lie on the cot and committed forcible penetrative sexual assault on the victim and also threatened the victim girl that if she reveals the same to anyone, he would take away the life of her parents and sister. In that way, he has threatened the victim and committed penetrative sexual assault on her for more than once. In order to substantiate the case of the prosecution, the victim was examined as P.W.2 and the mother was victim was examined as P.W.1. Earlier, the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C. wherein, she has clearly narrated the entire incidents. Though there are some minor discrepancies, the victim has clearly stated that the appellant



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is the one who committed penetrative sexual assault on her for several times. Even the doctor/P.W.10 who examined the victim has given opinion that the victim shows signs of defloration. Therefore, the evidence of the victim was corroborated by the evidence of the doctor/P.W.10 and by medical evidence viz., Ex.P.10, P.11 and Ex.P.13. Further, in order to prove the age of the victim, she was subjected to Radiological examination and the Radiological test report is marked as Ex.P.14 wherein it is clearly stated that the victim is aged above 16 years and below 18 years. Further, in order to prove the age of the victim, the school certificate issued by the Head Master/P.W.7 in which the victim was studying was marked as Ex.P.5 in which, the date of birth of the victim is mentioned as 05.04.2000. The first occurrence is alleged to have taken place one week before Diwali in the year 2015 and the 2nd occurrence is on 21.12.2015 and therefore, the victim was aged about 16 years at the time of occurrences and she had not completed the age of 18 years. Therefore, she was child under the definition of POCSO Act. Since the victim who was a child was subjected to penetrative sexual assault by the appellant for more than once, the offence committed by the appellant



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falls under Section 5(l) of POCSO Act which is punishable under Section 6 of POCSO Act. Further, the appellant has threatened the victim to take away the life of her family members if she discloses the same to anyone. Therefore, the appellant has also committed the offence under Section 506(1) IPC. The trial Court rightly appreciated the evidence and convicted the appellant. Though the defence side taken some defence, they have not substantiated the same. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

9. Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent and also perused the materials available on record.

10. In order to substantiate the charges framed against the appellant, on the side of the prosecution, as many as 11 witnesses were examined and 19 documents were marked. Out of the 11 witnesses, the victim was examined as P.W.2.



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11. A combined reading of the statement of the victim recorded by the Magistrate under Section 164 Cr.P.C. which was marked as Ex.P.2 and the evidence of the victim/P.W.2, show that the victim who was aged about 16 years was subjected to forcible penetrative sexual assault by the appellant for more than once.

12. The doctor who conducted medical examination on the victim was examined as P.W.10 and she has clearly deposed that the hymen of the victim was not intact and there are old tear wounds in the hymen and she has given opinion/Ex.P.13 that the victim shows signs of defloration. Further, the medical reports viz., Ex.P.10 and P.11 substantiated the opinion of the doctor.

13 Therefore, from the evidence of the doctor/P.W.10 and Medical evidence Ex.P.10, P.11 and P.13, it is proved that the victim was subjected to penetrative sexual assault for several times. Further, as per the evidence of the victim/P.W.2, the appellant is the one who committed the said offence. From Ex.P.14/Radiological Test Report and



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Ex.P.5/School certificate, the prosecution proved that the victim was aged about 16 years and she was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act and she had not completed the age of 18 years.

14. Admittedly there is no independent witness to this case. In the cases of this nature, no independent witnesses can be expected as the culprits would wait for the aloofness of the child and commit the offence. Further, in this case, the victim and the appellant are neighbors and the wife of the appellant is a physically challenged person and therefore, the neighboring women used to help the wife of the appellant. So naturally no one would doubt even if the appellant was found with the victim girl.

15. The contention of the learned counsel for the appellant is that the mother of the victim had borrowed money from the wife of the appellant and did not repay the amount and therefore, there was a quarrel between them due to which, a false case has been foisted against the appellant. Even assuming that the mother of the victim had borrowed



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certain amount from the wife of the appellant for which, no mother would sacrifice the reputation and future of her daughter to evade the repayment of loan amount. Though the learned counsel for the appellant tried to establish that the victim had intimacy with some other person, there is no evidence to substantiate the same and even no suggestion had been put forth before the victim in this regard during cross examination.

16. The further contention of the learned counsel for the appellant is that the victim has not clearly stated the specific date of occurrences and there are discrepancies and contradictions between the evidence of the victim made before the Court while examining as P.W.1 and statement made before the Magistrate under Section 164 Cr.P.C. Naturally, when a girl child is subjected to sexual assault, she would not reveal the same to everyone immediately as the child would stay on the said incident. Further, due to fear of parents and society and also the threat made by the accused, they would not immediately come forward to reveal the same to others. At one point of time, when the victim child come out and reveals about the incident, one cannot expect the victim to narrate each and everything with exact date and time. Therefore, mere



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discrepancies and contradictions between the evidence of the victim before the trial Court and statement of the victim made before the Magistrate under Section 164 Cr.P.C. and the non mentioning of specific dates may not be fatal to the case of the prosecution. Further, the contradictions are not material contradictions which would go into the root of the prosecution.

17. The further contention of the learned counsel for the appellant is that there is delay in lodging the complaint. As already stated the cases of this nature, the victims would not immediately reveal the incidents for so many reasons. Even the parents of the victim child due to fear on the society and future of the victim child, would not lodge the complaint immediately. Therefore, in the cases of this nature, mere delay is not a sole ground to disbelieve or discard the evidence of the victim.



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18. Perused the the defence witnesses viz., D.W.1/wife of the appellant and D.W.2/friend of the appellant. As per D.W.1 and D.W.2, there was a money transaction between the wife of the appellant and the mother of the victim due to which, there was quarrel between them during which, the mother of the victim along with her associates attacked the appellant. Hence, D.W.2 lodged a complaint before the Annathanapatti Police over phone and in order to escape from the complaint and also to escape from the liability, a false case has been foisted against the appellant. But the same is not acceptable since, no criminal complaint made on the side of the appellant is pending. Only in the defence, they have raised such a defence. Even P.W.1 and P.W.2 have admitted that there was a quarrel between P.W.2 and the wife of the appellant regarding money transaction, it is nothing to do with the present case which was committed by the appellant.

19. From the evidence of P.W.1/mother of the victim, P.W.2/victim, P.W.10/doctor and Ex.P.2/Statement of the victim recorded under Section 164 Cr.P.C., and medical reports viz., Exs.P.10, P.11 and P.13, the prosecution proved that the victim was subjected to penetrative sexual



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assault more than once and the appellant is the one who committed the said offence.

20. This Court finds that the evidence of the victim is cogent and natural one and there is no reason to discard or disbelieve the evidence of victim and it is also corroborated by the evidence of Doctor and medical records. Therefore, this Court finds that the appellant has committed the offence under Section 5(l) of POCSO Act, punishable under Section 6 of POCSO Act. Further in order to exploit the victim sexually, he has made threat is also proved. Therefore the trial Court rightly appreciated the evidence and convicted and sentenced the appellant as above. This Court as appellate Court while re-appreciating the entire evidence, does not find any perversity in the appreciation of evidence by the trial Court. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.



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21. Accordingly, this Criminal Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

22. M/s.S.Sridevi, Legal Aid Counsel, appeared on behalf of the appellant is entitled for the remuneration as per rules.

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Index:Yes/No



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To

1. The Sessions Judge, POCSO Cases, Special Court, Salem
2. The Inspector of Police
Salem Town, All Women Police Station
Salem
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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